No. 82-1771

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERTO ANTONIO LEON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1.a. For the most part, respondents and the amici curiae supporting them counter our arguments in favor of a "reasonable mistake" exception to the exclusionary rule with dire predictions about the demise of the Fourth Amendment and the values it protects. Respondents and their amici have largely chosen to ignore the fact that continued application of the exclusionary rule in the class of cases to which a reasonable mistake exception would apply—*i.e.*, those near the often indistinct boundary between good police work and impropriety—is as likely to deter the police from properly performing their job as it is to encourage compliance with the Fourth Amendment. Indeed, one of the most substantial group of cases to which a "reasonable mistake" exception would often apply is, we submit, cases in which the prosecution *should* have prevailed on the merits but in which lower courts *erroneously* find a Fourth Amendment

violation. See, *e.g.*, Gov't Br. 51 n.16. This Court cannot correct every such error itself, particularly in cases like the present one, in which the underlying Fourth Amendment issue is entirely fact-bound. Adoption of a reasonable mistake exception should therefore serve to return the balance where it properly belongs by eliminating the *over*-deterrence now imposed by unrelenting application of the exclusionary rule.[1] Any fair reading of our opening brief should

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[1] Respondents may well be correct that the prosecution should generally prevail without benefit of a reasonable mistake exception because the strong deference accorded to magistrates' determinations of probable cause (see, *e.g.*, *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 21-22, 23-24) is, at least in certain types of cases, the functional equivalent of our current proposal (see Leon Br. 9; Sanchez, *et al.* Br. 33-37). Yet respondents argue that this is so only in the wake of *Gates*. They conveniently ignore the fact that *Gates*'s rule of deference is not new, but instead merely reaffirms *United States* v. *Ventresca*, 380 U.S. 102 (1965), and *Jones* v. *United States*, 362 U.S. 257 (1960). The Court found in *Gates*, however, that many lower courts had not been applying the proper standard of review (*Gates*, slip op. 19 & n.9, 21), even though it had been settled for more than 20 years. It remains to be seen whether lower courts will pay greater attention to *Gates*'s reaffirmation of settled law than they did to *Jones* and *Ventresca*. (The Ninth Circuit, for example, has expressed the view (totally unfounded, in our submission) that *Gates*'s prohibition against de novo review of magistrates' determinations of probable cause may be limited to cases involving an informant's tip. See *United States* v. *Rubio*, No. 80-1577 (9th Cir. Dec. 20, 1983), slip op. 10-11.) It is worth noting, however, that there is a certain irony in respondents' vigorous opposition to a proposal they claim the Court has already effectively adopted in *Gates*.

In any event, a deferential standard of review is an incomplete substitute for the entire range of cases to which a reasonable mistake exception would apply. While the number of such cases has not, and probably cannot, be verified, their existence is undeniable. *Gates*'s rule of deference does not

dispel respondents' exaggerated concerns; indeed, as we previously noted (Br. 63-64, 76-77), the common-sense modification of the exclusionary rule that we propose should serve to strengthen the substance of the Fourth Amendment.

b. Respondents and their amici nevertheless argue that our proposal is in reality a direct attack on the Warrant Clause itself, and that a reasonable mistake exception to the exclusionary rule would, in the wake of this Court's decision in *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), represent a "double dilution" of the Fourth Amendment's probable cause standard. In the same vein, respondents and the amici supporting them argue that it is logically impossible to defend a reasonable mistake exception to the exclusionary rule because the result would be the creation of a category of "reasonably unreasonable search[es]" (see, *e.g.*, Leon Br. 54-57). Neither argument is persuasive.

Respondents' "double dilution" argument is based on a faulty underlying premise. The first level of "dilution," according to respondents, is the definition of probable cause articulated by this Court in *Gates*. Respondents and others may well believe that *Gates* "diluted" the definition of probable cause, but the Court itself did not. Instead, the Court stated that

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address, for example, the situation presented in cases like *Massachusetts* v. *Sheppard*, cert. granted, No. 82-963 (June 27, 1983). There, it is impossible to escape the conclusion that the search warrant was defective, no matter what the standard of review. Yet, as explained in our opening brief (at 67-68 & n.31), the defect was strictly technical and amounted to no more than harmless error. In such cases, reviewing courts should be free to consider the nature and effect of the error in determining whether the exclusionary "remedy" is appropriately invoked. (Respondents Sanchez, *et al.* appear to concede this point in their brief (at 35 & n.19).)

Gates's "totality of the circumstances approach is far more consistent with our *prior* treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip." *Gates*, slip op. 15-17 (emphasis added; footnote omitted). Indeed, the Court traced its reiteration of probable cause as a "'practical, non-technical conception'" back to its 1949 decision in *Brinegar* v. *United States*, 338 U.S. 160, 176. *Gates*, slip op. 16. Thus, respondents' first level of "dilution" involves no dilution at all but instead represents a reaffirmation of what the Court has long understood the concept of probable cause to entail.

Respondents' second level of "dilution" stems from their perception that we are asking the Court to approve warrants issued on less than probable cause, even as defined in *Gates*. That is not the case. Quite clearly, we could not and do not ask the Court to disregard the plain language of the Warrant Clause. Instead, our proposal only recognizes the obvious: satisfaction of the standard for probable cause will usually turn on fact-bound judgments that must be made on a case-by-case basis, and there will always be cases in which reviewing courts determine that the facts fall slightly short of meeting that standard even though reasonable persons could as easily have reached the opposite conclusion. Indeed, in the category of cases to which a reasonable mistake exception would apply, there will ordinarily be room for considerable difference of opinion concerning the reasonableness of the challenged practice. Respondents' argument reduces to the proposition that in any case in which this Court divides five to four on the question of probable cause, either five or four Justices of this Court are "unreasonable" because they came to the "wrong" conclusion. Obviously, it is untenable to suggest that

in this area of the law there can be only one "reasonable" answer, notwithstanding the fact that there can be only one *final* answer.

We thus ask the Court not to alter or "dilute" the Warrant Clause, but to recognize the distinction between the wrong and the remedy—a distinction ignored by respondents in their "double dilution" and "reasonably unreasonable searches" arguments. It does not follow that a search that is "unreasonable" in the sense that five Justices of this Court have said it is must be met with a rigid remedial prescription that may be unreasonably disproportionate to the violation. Rather, having found that a particular search or seizure was in violation of the Fourth Amendment, and therefore "unreasonable" as a matter of substantive law, a court should undertake a separate inquiry into the reasonableness of applying the exclusionary rule. See page 17, *infra*. This is a distinct facet of "reasonableness" that focuses not on the substance of the Fourth Amendment, but instead on the purposes to be served by the exclusionary rule. That there is no logical inconsistency in this approach is demonstrated by the Court's decisions in cases such as *United States* v. *Havens*, 446 U.S. 620 (1980); *United States* v. *Ceccolini*, 435 U.S. 268 (1978); *United States* v. *Calandra*, 414 U.S. 338 (1974); and *Alderman* v. *United States*, 394 U.S. 165 (1969) (see the discussion at pages 34-38 of our opening brief).

2. The modification of the exclusionary rule that we propose would in no way undermine the existing incentives for police adherence to *settled* Fourth Amendment norms. Respondent Leon's argument to the contrary (Br. 37-39; see also Sanchez, *et al.* Br. 17-18 & n.7) is untenable. Leon contends (Br. 37-39) that a number of this Court's prior cases

would have been decided differently had the Court previously employed a reasonable mistake exception to the exclusionary rule *and* that those cases would now be "effectively overruled" (*id.* at 38). While the first observation may well be correct (see *Gates*, slip op. 11 n.12 (White, J., concurring)), the second is utterly without support. On the contrary, our proposal does not require this Court to overrule any of its prior precedents. The cases to which respondent Leon refers already have been decided, and, regardless of what the result in any particular case might have been had the Court employed a "reasonable mistake" approach, those decisions now represent established Fourth Amendment law. Under our proposal, the exclusionary rule would continue to apply in essentially unchanged form to evidence seized in clear violation of settled constitutional principles; thus, whatever deterrence the rule now provides would continue largely undiminished.

3. Central to respondents' argument is the contention that adoption of a reasonable mistake exception to the exclusionary rule would "freeze" Fourth Amendment jurisprudence in its present state because the courts would be thereafter disabled from adjudicating new or unsettled issues by the likelihood that a disposition of the issue in the defendant's favor would nevertheless not lead to reversal of his conviction. Jurisprudential principles rooted in Article III thus would, it is asserted, preclude the courts from deciding substantive constitutional search and seizure issues, and the exclusionary rule would no longer provide a vehicle for new constitutional adjudications to guide future behavior of law enforcement officials. This line of argument is multiply flawed.

a. There is no serious dispute that the fundamental justification for the exclusionary rule resides in its hoped-for effect of securing governmental obedience to the dictates of the Fourth Amendment as explicated by the courts. There is, however, a significant difference between that purpose and the purpose ascribed to the rule by respondents and others opposing our position, *viz.*, to create for the courts opportunities to render new constitutional adjudications. Any such justification for the exclusionary rule is surely a classic example of the tail wagging the dog. To anyone but a lawyer, and even to many lawyers, the idea that the exclusionary rule must be retained in its present form in order to perpetuate opportunities for litigation must seem absurd. Preserving a rule of evidence that is as demonstrably costly and ineffective as the exclusionary rule (in the class of cases here considered) for the purpose of assuring a continued flow of litigation is surely beyond the proper limits of the judicial function. Indeed, it is particularly ironic for respondents to support their argument that the exclusionary rule is needed to provide constitutional cases for the courts to adjudicate by reliance on this Court's cases cautioning against the unnecessary resolution of constitutional issues (Leon Br. 26 & n.40; Sanchez, *et al.* Br. 27).

b. Even if respondents and their amici were correct in their contention that adoption of a reasonable mistake exception to the exclusionary rule would deprive suppression motions of their status as vehicles for resolution of heretofore unsettled issues of substantive Fourth Amendment law (a proposition refuted in our opening brief (at 83-86 & n.52) and elaborated upon below), many of the more important and recurring issues of this nature can be resolved in

other types of judicial proceedings. See *Gates*, slip op. 20-21 & n.19 (White, J., concurring). For example, although there are no doubt limits on the circumstances in which such actions will lie (*e.g.*, *Rizzo* v. *Goode*, 423 U.S. 362 (1976)), a pattern or practice of official conduct that is alleged to violate Fourth Amendment rights can often be challenged by an aggrieved individual in a suit for declaratory and injunctive relief. The warrant/subpoena issue decided by the Court in *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), is one example of such litigation. The "border search" practice condemned in *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979), is another issue that unquestionably could have been resolved as well in an action for declaratory relief by a regular traveler to Puerto Rico who was subjected to such searches upon arrival. The same is true of the checkpoint stop issue resolved in *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), the validity of suspicionless boat stops for document inspections in inland waters upheld in *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), and the constitutionality of INS factory inspection procedures, now before the Court in *INS* v. *Delgado*, cert. granted, No. 82-1271 (Apr. 25, 1983).

It is true that not every arguably unconstitutional practice will be amenable to review in a suit for declaratory or injunctive relief, for such suits require a proper plaintiff. See *City of Los Angeles* v. *Lyons*, No. 81-1064 (Apr. 20, 1983). But even if no individual may be sufficiently exposed to risk of future injury to bring an action for declaratory or injunctive relief, damages actions against municipalities under 42 U.S.C. (Supp. V) 1983 also afford an avenue for substantive judicial review of the validity of many questionable police practices. Although a municipality

is not liable under Section 1983 on a theory of *respondeat superior*, local governing bodies *are* subject to suit for constitutional torts resulting from implementation of local ordinances, regulations, policies, or even customary practices. *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). And by virtue of the holding in *Owen* v. *City of Independence*, 445 U.S. 622 (1980), such entities enjoy no good faith defense that might (under respondents' theory) impede resolution of the substantive constitutional issue. Consequently, for example, the validity of the policy of a local police force to make random, suspicionless stops of automobiles to enforce motor vehicle licensing and registration laws, decided by this Court in *Delaware* v. *Prouse*, 440 U.S. 648 (1979), could as well have been decided in a damages action by a motorist who had been unlawfully stopped (without even the cost of letting a single guilty offender go free).[2] Similarly, the validity of police automobile inventory practices, passed upon in *South Dakota* v. *Opperman*, 428 U.S. 364 (1976), could instead have been adjudicated in a civil action. The validity of the "chokehold" practice challenged in *City of Los Angeles* v. *Lyons*, *supra*, likewise could be resolved in an action for damages (see *Lyons*, slip op. 9), as could the statutorily-authorized suspicionless "pat-downs" invalidated in *Ybarra* v. *Illinois*, 444 U.S. 85 (1979).

Finally, it may be predicted with some assurance that even if this Court modifies the exclusionary rule as we have proposed, a number of state courts will decline to follow its lead as a matter of state law and

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[2] Respondent Leon seems to argue (Br. 66) that the "cost of one marijuana conviction" is a small price to pay for the benefit of the decision in *Prouse*. As we have shown above, however, even that cost need not have been incurred.

will continue to suppress evidence in state trials for any Fourth Amendment violation. This Court should therefore still have available a sufficient supply of state criminal cases in which to resolve important, unsettled questions of Fourth Amendment law.

Perhaps the various avenues for substantive constitutional adjudication discussed above would not provide as fast and furious a supply of Fourth Amendment issues as does the present form of the exclusionary rule, but there is no basis for concluding that important, recurrent issues need go too long unresolved even if modification of the exclusionary rule were to diminish substantially the number of criminal cases in which resolution of such issues is essential. Accordingly, there need be no fear that Fourth Amendment law will become "frozen" in its current state.[3]

c. In any event, as noted in our opening brief (at 83-86 & n.52), there is no jurisdictional bar to a court's deciding a question of Fourth Amendment law even if the outcome of the case may in the end be controlled by application of a reasonable mistake exception to the exclusionary rule. Respondents' reliance

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[3] If respondents and their amici are correct in their assertion that a reasonable mistake exception to the exclusionary rule would "freeze" the development of Fourth Amendment law, then it logically follows that the Court unwittingly "froze" the development of other constitutional rights when in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), it approved a good-faith defense for Executive Branch officials sued for damages that is essentially the same as what we propose here. We doubt that the Court thought it was doing any such thing or, if it was, that the outcome of the case should have turned on the effect the decision would have on opportunities for future litigation.

on Article III is misplaced.[4] At bottom, respondents' argument is that courts are constitutionally required to limit their opinions to the bare minimum necessary to make a dispositive judgment of the particular case. This position reads far more into Article III than this Court has ever suggested. Nothing in Article III prevents a court from analyzing the issues presented by a suppression motion in whatever order it deems most appropriate (see the discussion at pages 85-86 of our opening brief).

Conceptually, the situation here is no different from countless other situations in which a claimant must clear more than one hurdle before establishing his entitlement to relief. For example, nothing in Article III requires a court to decide a plaintiff's entitlement to damages before it decides the question of liability, even though a holding that the plaintiff is entitled to no damages would render decision of the liability issue unnecessary. Logically, a court would almost always determine liability before it considers relief, and the situation here would be no different. Respondents also ignore the possibility that the Fourth Amendment issue is potentially dispositive of the entire controversy if it is resolved in the prosecution's favor (making it unnecessary to consider the applicability of a reasonable mistake exception). Instead, they apparently would require a court to organize its consideration of a case backwards, looking always to find any affirmative defense that might de-

[4] Respondents offer no explanation for the numerous cases noted in our opening brief (at 85 n.51) in which courts decide the merits of Fourth Amendment claims before deciding that the error, if any, was harmless. Yet respondents' position would require the conclusion that all of those rulings were beyond the power of the courts to make.

feat relief before examining the substance of the claim.[5]

This Court has never suggested that such a practice is required. Indeed, in *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), the Court followed precisely the procedure that, according to respondents, would violate Article III. In that case, the Court first held that respondent had been unconstitutionally deprived of his right to liberty through confinement in a mental institution (422 U.S. at 573-576). The Court then remanded the case for the court of appeals to consider petitioner's claim of a good-faith immunity defense in light of the intervening decision in *Wood* v. *Strickland*, 420 U.S. 308 (1975). Had the Court accepted respondents' view of Article III, it necessarily would have remanded the case without deciding the Fifth Amendment claim.

Respondents' error lies in confusing the case or controversy requirement of Article III with the *jurisprudential* policy of this Court to avoid unnecessary constitutional decisions. That long-established policy is beyond reproach, and we do not suggest that the Court depart from it as a general rule. But neither should the Court turn a prudential guideline into rigid constitutional doctrine (cf. *Hagans* v. *Lavine*, 415 U.S. 528, 546 (1974) ("[t]he doctrine is not ironclad * * *")). When sound reasons exist for de-

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[5] In the civil context, " 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815 (1982); *Gomez* v. *Toledo*, 446 U.S. 635 (1980). If the same analytic framework were to apply in the context of a reasonable mistake exception to the exclusionary rule, a court surely would be free to consider the defendant's claim of a Fourth Amendment violation before taking up the prosecution's assertion of an affirmative defense.

parting from the general policy, Article III imposes no barrier against doing so. Thus, although courts clearly are not compelled to decide constitutional questions that may not dispose of a case, there is no error in doing so, especially when the "questions are otherwise properly before [the court] and may be resolved without imposing * * * additional litigative burdens." *Davis* v. *Passman*, 442 U.S. 228, 236 n.11 (1979).

Cases raising novel or unresolved but important and recurrent search and seizure questions might well present appropriate situations for the courts to depart from their normal practice, because the prudential reasons for avoiding unnecessary constitutional decisions would be outweighed by a perceived need to provide law enforcement officers with guidance concerning lawful conduct. The constitutional ruling in such cases would not be a prohibited advisory opinion because, as noted in our opening brief (at 85), it is clear that the defendant would be presenting a live controversy concerning the requirements of the Fourth Amendment. The end result simply would be that, notwithstanding the constitutional violation, the defendant would not be entitled to the remedy of suppression.[6]

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[6] Even assuming arguendo some merit to respondents' position on this issue, the most it would support would be a small exception to the modification of the exclusionary rule that we propose. Most of the cases in which it would be appropriate to apply a reasonable mistake exception will involve sui generis factual situations that either are or are not compatible with existing law. Whether or not courts would retain the power to decide such cases is relatively unimportant, because the decisions would be of little importance in guiding future conduct in anything but precisely the same factual situation. Cases raising pure issues of Fourth Amendment law never before addressed are relatively rare, however, and it is only those cases to which respondents' argument has any relevance.

4. Respondents argue (Sanchez, *et al.* Br. 28-29) that a reasonable mistake exception will halt the development of "bright-line" rules to guide police conduct. We have just shown that respondents' fear that Fourth Amendment adjudications will cease is unfounded. But even assuming the correctness of respondents' underlying premise, it is clear that bright-line rules cannot possibly be devised for every Fourth Amendment situation confronting law enforcement officials in the performance of their duties. As one commentator has observed (Ashdown, *Good Faith, The Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process*, 24 Wm. & Mary L. Rev. 335, 365 (1983)):

> The problem * * * is an inherent inability to achieve an adequate level of irradiation for the police to consistently follow and for the courts to effectively utilize. Fourth Amendment encounters between the police and the public are simply too numerous and too varied to be subject to standardized procedures that will always dictate the appropriate police response. Because of this variety and diversity, attempts to draft bright-line rules have proved unsuccessful. Such rules provide some guidance but are incapable of addressing in advance all the factual situations that police may encounter.

The instant case offers a clear example of the impossibility of devising bright-line rules for every situation. Respondents have not even attempted to articulate any rule that would have told Officer Rombach what additional information he should have obtained before applying for a warrant in this case (assuming, arguendo, that the lower courts correctly held that he had not already obtained sufficient information to es-

tablish probable cause). Thus, it is in fact-bound disputes such as the present one that the courts are least able to guide officers in the daily performance of their duties. As the Court observed in *Gates*, slip op. 23 n.11, "[t]here are so many variables in the probable cause equation that one determination will seldom be a useful 'precedent' for another." See also slip op. 17. Moreover, it is in these same cases that the risk of *erroneous* suppression rulings is at its greatest, because it is inevitable that reasonable persons will differ as to the sufficiency of a given quantum of information when the question is a close one. Thus, however desirable the development of bright-line rules may be, such rules provide no solution to cases such as this.

5. Respondents contend (Leon Br. 57-58; Sanchez, *et al.* Br. 11-16) that the exclusionary rule is a constitutionally required remedy for Fourth Amendment violations. Respondents Sanchez, *et al.* argue (Br. 11-14) that the exclusionary rule is required by the Fifth Amendment as well, relying on this Court's decision in *Boyd* v. *United States*, 116 U.S. 616 (1886), and Justice Black's concurring opinion in *Mapp* v. *Ohio*, 367 U.S. 643, 662 (1961) (Black J., concurring). Neither argument is correct.

a. Respondents' Fifth Amendment argument completely overlooks this Court's decision in *Andresen* v. *Maryland*, 427 U.S. 463 (1976). There, the Court squarely rejected the notion that the broad language in *Boyd* and subsequent cases discussing the relationship between the Fourth and Fifth Amendments compelled suppression of petitioner's business records (427 U.S. at 472). The Court explained (*id.* at 473-474) that:

> This case thus falls within the principle stated by Mr. Justice Holmes: "A party is privileged from producing the evidence but not from its production." *Johnson* v. *United States*, 228 U.S. 457, 458 (1913). This principle recognizes that the protection afforded by the Self-Incrimination Clause of the Fifth Amendment "adheres basically to the person, not to information that may incriminate him." *Couch* v. *United States*, 409 U.S., at 328. Thus, although the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information, see *Fisher* v. *United States*, *supra*, a seizure of the same materials by law enforcement officers differs in a crucial respect—the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence.

Here, too, because respondents were "not compelled to testify in any manner" (*Andresen*, 427 U.S. at 477), the Fifth Amendment privilege against self-incrimination is simply not implicated. See also Wilson, *The Origin and Development of the Federal Rule of Exclusion*, 18 Wake Forest Law Rev. 1073, 1096-1101 (1982).

b. Respondents' argument that the exclusionary rule is required by the Fourth Amendment fares no better. As we noted in our opening brief (at 31), the Court has never held that the rule is constitutionally required. Respondents' argument to the contrary depends on the "personal right" theory (see Leon Br. 57-58)—a doctrine long ago repudiated by this Court. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 348 (1974) (exclusionary rule not "a personal constitutional right of the party ag-

grieved"). Respondents and their amici dismiss *Calandra* and other cases rejecting the personal right theory on the basis that those cases involved the "collateral" use of illegally obtained evidence, rather than the use of such evidence as part of the government's case-in-chief against a defendant who has himself been the victim of an unlawful search or seizure.[7] Only last Term, however, the Court reiterated its rejection of the personal right theory (*Gates*, slip op. 8) without in any way suggesting that the rejection was limited to "collateral" uses of illegally obtained evidence. Instead, the Court observed, in words of general applicability, that "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Ibid.* The Court made the same point in *United States* v. *Janis*, 428 U.S. 433, 443 (1976) (footnote omitted):

> [The] comparatively late judicial creation of a Fourth Amendment exclusionary rule is not particularly surprising. In contrast to the Fifth Amendment's direct command against the admission of compelled testimony, the issue of admissibility of evidence obtained in violation of the Fourth Amendment is determined after, and apart from, the violation.

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[7] Respondents fail to account for *United States* v. *Janis*, 428 U.S. 433 (1976), in which the Court sanctioned the use in a federal civil tax proceeding of evidence obtained in violation of the Fourth Amendment by local law enforcement officials. The Court's analysis of the case in terms of the amount of deterrence to be obtained versus the costs of suppression would not be supportable under the "personal right" doctrine because there was no question that Janis's "personal rights" had been violated by the unlawful state search.

See also *Scott* v. *United States*, 436 U.S. 128, 135-137 (1978); Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 S. Tex. L.J. 531, 542-557 (1982).

In our view, therefore, the nature of the proceeding, though relevant, is not a controlling inquiry; rather, the question is whether the "remedial objectives * * * [of the exclusionary rule will be] efficaciously served." *Calandra*, 414 U.S. at 348. While it may be conceded, for purposes of argument, that those objectives are most likely to be served in the context of the main criminal trial itself, nevertheless, as we demonstrated in our opening brief, they are not *sufficiently* served in situations in which the police cannot reasonably be expected to have known that their conduct would later be declared unlawful. Assuming, arguendo, that the Constitution contemplates a remedy for Fourth Amendment violations, respondents have nevertheless failed to provide any support for the proposition that the Constitution requires an *ineffective* remedy. The Court's decisions limiting the suppression remedy to those cases in which it can be expected to achieve its intended result are thus fully consistent with the Constitution, as is our proposal for a reasonable mistake modification to the exclusionary rule.

6. Citing various empirical studies, respondents contend that the exclusionary rule actually frees very few criminal defendants (Sanchez, *et al.* Br. 60-64; Leon Br. 43-53).[8] In the final analysis, however, the

[8] Judge Wilkey has offered one explanation for this phenomenon (Wilkey, *supra*, at 536-537):

> [T]he percentage of prosecutions lost because of the exclusionary rule * * * will remain about the same, no matter what the law is. This is true because any intelligent

conflicting empirical data would seem to be of little benefit to the Court; it is more probable, as Justice White noted in his concurrence in *Gates* (slip op. 12), that "[w]e will never know how many guilty defendants go free as a result of the rule's operation." But this Court's own experience would seem to belie respondents' minimization of the impact of the exclusionary rule. As we noted in our opening brief (at 51 n.16), last Term alone this Court reversed seven lower court decisions that had invalidated searches or seizures on Fourth Amendment grounds. If that many cases are affected at the apex of the criminal

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prosecutor's office will immediately adjust itself to the most recent decision on the exclusionary rule or any other principle of law affecting the chance of conviction or acquittal in future cases. No matter whether the latest case increases or decreases the likelihood of suppression of evidence, the prosecutor will adjust his decisions about which accused criminals to prosecute on the basis of the law which is now actually in effect.

In other words, the prosecutor will always bring all of the cases which he is confident of winning, and a number of cases which are on the borderline * * *. But * * * the prosecutor will change his assessment of the probably winnable and the improbably winnable as the shifting tides of jurisprudence from the higher courts inform him of where the law is. Hence, the percentage of prosecutions won and lost will remain about the same in every intelligent, up-to-date prosecutor's office, no matter what the law is or how the rules change.

Another explanation is that the world respondents depict appears to be one in which very few Fourth Amendment violations occur or, if they do, they are visited primarily upon innocent persons who never have the opportunity to invoke the exclusionary rule. In either event, if the rule actually has as little practical effect as respondents contend, it is difficult to grasp the justification for maintaining it in cases such as the present one.

justice pyramid, it simply is not credible to assume that the rule's impact in the lower courts is insignificant.

Assuming for the sake of argument, however, that respondents are correct in their assessment of the rule's impact, their vigorous opposition to our proposal can be explained only by a desire to retain the windfall benefits of the rule for the few guilty defendants who are fortunate enough to invoke it successfully. We have previously shown that the rule would remain unchanged in the case of clear violations of the Fourth Amendment, and respondents have utterly failed to demonstrate how the rule's deterrent purposes can be achieved when it is applied to conduct that the police could not reasonably be expected to have known was illegal. Thus, retention of the rule in the class of cases here under consideration *is* costly no matter how few guilty defendants escape conviction because no countervailing benefits are obtained for the criminal justice system; on the contrary, the system is severely taxed by having to devote significant amounts of time and resources to Fourth Amendment issues of only marginal significance (see Gov't Br. 74-75).

7. Respondents' apocalyptic prediction that creation of a reasonable mistake exception to the exclusionary rule would result in the wholesale abdication by magistrates of their duty to make a reasoned decision on every application for a search warrant is riddled with contradictions. On the one hand, respondent Leon argues, in effect, that most magistrates are already so incompetent that they cannot be trusted to perform their job (Br. 10-13). On the other hand, he argues (Br. 13-16) that they can be controlled through judicial review, which he erroneously assumes

would cease if the Court were to adopt a reasonable mistake exception. But if magistrates are already failing to perform their job, the logical conclusion to be drawn is that they are simply unresponsive to the suppression sanction, and its continued application to them therefore serves no purpose. Similarly, respondent Leon argues (Br. 18) that virtually all magistrates are "rubber stamps" under the current system, and at the same time contends (Br. 22) that a reasonable mistake exception would encourage "magistrate shopping." If respondent Leon's view of the current system is at all accurate, there would be no need for the police to resort to "magistrate shopping" in the future.

In our submission, respondents' dismal picture of magistrates' current performance is greatly exaggerated,[9] but, in any event, respondents have offered no reason to believe that a reasonable mistake exception would create any new incentive for magistrates to be lax or remiss in their duties. Moreover, respondents ignore the fact that magistrates have no partisan stake in the outcome of a prosecution (see Gov't Br. 58-60). To the extent that magistrates are trained professionals (*e.g.*, lawyers or judges), they may be expected to respond to the judicial guidance supplied by appellate review which, as we have shown, would continue to be available in appropriate cases. Maintaining the additional sanction of suppression, how-

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[9] Although respondents paint a picture of magistrates across the nation issuing vast numbers of wholly unjustified warrants, they fail to cite any substantial body of case law for their assumptions, and we doubt that the cases would bear them out. In any event, warrants so totally lacking any basis for issuance would not fall within the scope of a reasonable mistake exception to the exclusionary rule (see Gov't Br. 65-66 & n.28).

ever, is simply overkill; it cannot "deter" those who have no stake in being deterred. Non-lawyer magistrates, on the other hand, are even less likely to be influenced by the exclusionary rule. Not only do they lack any stake in the prosecution, but they also lack the professional background necessary to make them responsive to appellate oversight. Granting, then, that the use of non-lawyer magistrates may well be a matter of concern for the criminal justice system, the fact remains that suppression is an inappropriate response to the problem.[10] It cannot be shown to serve the purpose of improving magistrates' performance, while at the same time it penalizes the police for mistakes they did not make. In short, the problem of poor performance by some magistrates will not be solved by continued application of the exclusionary rule to the type of case under consideration here.

8. We clearly stated in our opening brief (at 78-81) that the reasonable mistake exception should be grounded in objective reasonableness and that the

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[10] As Justice White noted in his concurrence in *Gates* (slip op. 18 n.17), this Court's holding in *Shadwick* v. *City of Tampa*, 407 U.S. 345 (1972), was quite narrow. Although the Court upheld the issuance by non-lawyers of arrest warrants for breaches of municipal ordinances, it did not hold, in *Shadwick* or in any other case, that any person taken off the street can issue any type of warrant. Rather, "an issuing magistrate must * * * be neutral and detached, *and he must be capable of determining whether probable cause exists for the requested arrest or search*" (*Shadwick*, 407 U.S. at 350 (emphasis added)). Thus, the solution to problems of the type encountered in *State* v. *Upchurch*, 267 N.C. 417, 148 S.E.2d 259 (1966) (see Leon Br. 11 & n.10), lies not in the exclusionary rule as applied on a case-by-case basis, but rather in disqualification of "magistrates" who do not meet *Shadwick*'s dual requirements. See *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

subjective intent of the searching officer would be irrelevant (except, perhaps, in those rare cases in which a warrant was procured in bad faith or on the basis of material misrepresentations (see *Franks* v. *Delaware*, 438 U.S. 154 (1978)). Nevertheless, respondents persist in the argument that our proposal would necessarily entail a subjective component as well, apparently for the dual purpose of enabling them to present the Court with the spectre of unwieldy judicial proceedings and repetition of the canard that our proposal would "place a premium on police ignorance." Neither proposition has merit.

Respondents themselves acknowledge that a subjective inquiry would be both awkward and unproductive. See Sanchez, *et al.* Br. 46. It is precisely for these reasons that we would eschew the subjective inquiry altogether. The objective assessment that we propose would be conducted in much the same manner as substantive Fourth Amendment questions are now decided and would be no more difficult than what is required in good-faith immunity cases under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Asking an officer "to explain why he acted unconstitutionally" (Sanchez, *et al.* Br. 46) would be neither necessary nor appropriate. Rather, the determination of objective reasonableness would be essentially a question of law, in which a court need determine only whether an officer's conduct departed unduly from established Fourth Amendment principles.[11]

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[11] Respondents criticize us for failing to define the "reasonably well-trained officer" with absolute precision (Leon Br. 33-34; Sanchez, *et al.* Br. 46 n.34). We continue to believe that a complete definition can best be developed through initial consideration by lower courts. But that is not to say that the question is as murky as respondents would have the

The contention that a reasonable mistake exception would put a premium on police ignorance is a strawman; by definition, a reasonably well-trained officer must have more than a passing acquaintance with Fourth Amendment law. For the same reason, there would be no incentive for police departments to abandon training programs, or for individual officers deliberately to engage in searches of dubious legality, because to do so would deprive them of the benefits of an objective reasonable mistake exception. So too, the incentives for internal review of warrant applications would continue unchanged. On the federal level, FBI and DEA agents are *required* to obtain the approval of an Assistant United States Attorney before applying for a search warrant,[12] and that policy would not be abandoned if a reasonable mistake exception were adopted. Indeed, any law enforcement officer or department that sanctioned a shift from " 'what does the fourth amendment require?' to 'what will the courts allow me to get away with?' " (Stewart, *The*

Court believe. For example, the reasonably well-trained officer would be expected to know the governing law in the jurisdiction in which a particular case is tried. In this case, therefore, Officer Rombach should be held to a standard of knowledge that encompasses the relevant decisions of this Court and the Ninth Circuit. It would not matter whether the officer was an FBI agent, a city police officer, or a rural deputy sheriff; regardless of the officer's particular background, he would have to meet the standards of the court in which the evidence is sought to be admitted.

[12] See, *e.g.*, FBI, U.S. Dep't of Justice, *Legal Handbook for Special Agents* §§ 2-6, 2-7.1, 2-7.2 (Aug. 27, 1982). While the practice among the states undoubtedly varies, it is our experience that law enforcement officers generally consult with prosecutors prior to applying for search warrants. In this case, for example, Officer Rombach consulted with three deputy district attorneys (Pet. App. 14a).

Road to Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1403 (1983) (footnote omitted)) would simply be increasing the likelihood of suppression. Assuming the validity of the deterrence rationale by which the exclusionary rule is justified, there is thus no basis for supposing that a reasonable mistake exception would encourage Fourth Amendment violations.

In short, it is beyond dispute that police training in the requirements of the Fourth Amendment has improved markedly since *Weeks* and *Mapp* were decided. But even the best-designed training programs can do no more then educate officers as to the extant principles of law. Hypothetical answers to unsettled questions as to which reasonable judges could differ cannot realistically serve as a guide for police conduct. Once the questions have been answered, however, the reasonable mistake exception we propose will increase the incentives for police departments to disseminate new legal rulings as rapidly as possible. Far from placing a premium on ignorance, an exception that is keyed to the reasonably well-trained police officer places a premium on reasonableness and on training.

9. Respondents Sanchez, *et al.* argue (Br. 48-50) that any modification of the exclusionary rule should be left to Congress. While legislative action would indeed be an appropriate and welcome response to the increasingly widespread recognition that the rule requires modification, this Court need not wait for Congress to act. More than a decade ago, the Chief Justice urged congressional action (*Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 421 (1971) (Burger, C.J., dis-

senting)), but to date Congress has not responded. The speculative possibility that legislation might someday be enacted should not deter the Court from resolving the important question presented by this case, particularly when the issue is the proper application of a rule created by this Court itself.

10. Finally, respondent Leon argues (Br. 70-73) that any reasonable mistake modification adopted by this Court should not apply to him because "no reasonable California police officer could conclude, under the prevailing articulated legal standards, that probable cause to search Mr. Leon's house had been made out" (*id.* at 70 (footnote omitted)). Notably, the other respondents make no comparable arguments. Respondent Leon is able to make the argument only by reliance on a rigid reading of the now-discarded *Aguilar-Spinelli* test; [13] his argument that no reasonable officer could have concluded that the "totality of the circumstances" established probable cause flies in the face of common-sense experience in narcotics cases. As Judge Kennedy observed in dissent, the officers' month-long investigation in this case revealed a pattern of conduct that "was inconsistent with any explanation other than illegal drug activity" (Pet. App. 5a).[14]

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[13] Respondent Leon also bases his argument on California law (Br. 73 nn.140 & 141). As previously noted (see pages 23-24 note 11, *supra*), California law is irrelevant to what should be expected of a reasonably well-trained police officer in a *federal* prosecution.

[14] Because the application of a reasonable mistake exception was not adjudicated below, the most that can be made of respondent Leon's argument is a remand for initial determination by the courts below. We would have no objection to such a proceeding if the Court deems it necessary.

For the foregoing reasons, as well as those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

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